Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

PERRY MARUCA,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the admission of incriminating statements and evidentiary observations procured through custodial interrogation in violation of *Miranda* can be admitted in a state criminal proceeding under a "voluntariness" theory, in overt disregard of this Court's opinion in *Michigan v. Mosley* 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)?

2. Whether the admission of evidence derived directly from a *Miranda* violation is "harmless error" where the resultant testimony included an alleged acknowledgement of wrongdoing by the accused and contradictory statements concerning the complaining witness' conduct?

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OPINION BELOW

The opinion of the Colorado Court of Appeals is set forth in the Appendix, as is a copy of the Order denying the copy of the appeals court denial of rehearing, and the order by the Colorado Supreme Court denying Writ of Certiorari, rendering this a final judgement.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

28 U.S.C. § 1257(A): Certiorari jurisdiction for review of state court criminal proceedings.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment V:

No person...shall be compelled, in any criminal case, to be a witness against himself...

STATEMENT OF THE CASE

Petitioner was convicted of a state criminal charge of felony menacing arising out of a domestic dispute between him and his girlfriend, May Okihiro. Petitioner and Okihiro had become involved in an extended argument taking place over a two-day period about the future of their relationship; the police were not called but Okihiro left, taking her possessions with her, when petitioner went to work. The police only became involved in following up a subsequent "missing person" report filed by petitioner: petitioner's girlfriend told the police, after they had located her, that petitioner had threatened suicide during the course of the argument, culminating in his allegedly threatening to "take her with him" while holding a firearm.

Perry Maruca was then told by the police to come to the station where, in an interview room, after being told he was under arrest, he invoked his right to remain

silent, advising the inquiring officers unequivocally that "he did not wish to speak" to them. The trial judge found that no *Miranda* advisal was given.

Despite this invocation of the right to remain silent, however, one of the officers persisted in questioning petitioner, asking him "where his guns were." This inquiry led to petitioner admitting that he had firearms, that he knew why the detective had asked him about his guns, acknowledging that it might be appropriate to turn those firearms over to the officers for "safekeeping."

After these incriminating responses, petitioner and the two officers traveled to his home, where firearms were observed and seized. In addition, during the course of this firearms foray, petitioner allegedly made two additional statements: that he had been "thinking of taking himself out" and that "he knew that May Okihiro had left him because she had taken her clothes with her." These two remarks were highly incriminating. The first statement corroborated the complaining witness' account of the incident. The latter utterance was inconsistent with the missing persons report that petitioner had filed, the document which was the genesis of the entire investigation.

Despite uncontroverted testimony that Perry Maruca was questioned while under arrest in a police interview room, a fact finding that no *Miranda* warning was given, and uncontroverted testimony from one of the officers that he questioned petitioner *after* the accused unequivocally stated that he did not wish to speak with the officers, the trial court held that the information provided about the handguns was admissible as "volunteered." The trial judge disregarded the *Miranda* and *Mosley* decisions entirely, denying

suppression of the statements and subsequent seizures on the theory that the question asked arose because of the officers' duty "to tell people why they are being taken into custody!"

Despite the essentially uncontroverted facts, and this curious ruling by the trial court which utterly ignored the facts, the Colorado Court of Appeals affirmed the conviction in a 2:1 decision. The Court of Appeals reached an equally insupportable legal conclusion that the constitutional violations which took place were "harmless error." The Colorado Supreme Court denied certiorari, making this a final state court judgment.

ARGUMENT

THE STATEMENTS ATTRIBUTED TO PETITIONER AND RESULTANT EVIDENTIARY OBSERVATIONS MADE BY THE OFFICERS SHOULD NOT HAVE BEEN ADMITTED AT TRIAL, AS SUCH EVIDENCE WAS OBTAINED UNCONSTITUTIONALLY; THIS EVIDENCE WAS HARMLESS BEYONDA REASONABLE DOUBT

In this state criminal trial, incriminating statements by the accused and physical evidence seized as a direct consequence of petitioner's statements were admitted at trial. The evidence at the suppression hearing established the following essential facts concerning the statements obtained and the consequent seizures:

1) that petitioner was in custody, and was not free to leave;

2) that petitioner was advised that he was under arrest for felony menacing;

3) that petitioner expressed a clear-cut desire to remain silent;

4) that after invoking his right to remain silent, petitioner was specifically questioned without *Miranda* advisal and in disregard of his invocation of the right to remain silent concerning the location of "his guns;"

5) that such questioning concerning the whereabouts of guns took place several days after the alleged incident, when there was no danger to public safety;

6) that evidence about the statements elicited and physical evidence thereafter seized was admitted over defense objections during petitioner's trial; and finally,

7) that the credibility of the complaining witness was essential to the prosecution's case since no physical evidence substantiated her story, credibility which was enhanced by the evidence obtained through custodial interrogation in violation of *Miranda.*

These facts require that this unconstitutionally obtained conviction be set aside.

This Court's landmark decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), established the entitlement to be advised of the

right to remain silent and the right to terminate custodial questioning through the invocation of the Fifth Amendment. In creating *Miranda* warnings, this Court traced the historical underpinnings of the Fifth Amendment, noting that: "These precious rights were fixed in our Constitution only after centuries of persecution and struggle." *Id.* at 442. *Miranda* established that a proper advisement of rights "is an absolute prerequisite to interrogation," but perhaps more importantly here, definitively directed that if "an individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him." *Id.* at 445, 471.

An aspect of this Court's rationale in *Miranda* was the recognition of the pervasive persuasiveness of police interrogation procedures. One form of interrogation discussed in *Miranda* was that of displaying an "air of confidence in the suspect's guilt," that the "guilt of the subject is to be posited as a fact." *Id.* at 450. Just such a technique was utilized here: despite the invocation of the right to remain silent, petitioner was specifically questioned about the whereabouts of "his guns," as though there was no doubt that he in fact possessed firearms and that they had been recently utilized in some sort of altercation with his girlfriend.

As this Court made clear in *Miranda*, custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. There was no dispute that Perry Maruca was asked to come to the police station, was placed under arrest, and thereafter, stated that he did not wish to speak with the officers yet custodial interrogation followed. A more patent

Miranda violation can hardly be imagined. As this Court made manifest in *Miranda*:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. *Id.* at 473-474.

This right to "cut off" questioning is critical: without this entitlement, the coercive setting of custodial interrogation has the effect of overcoming the free will of persons accused of crime, thus producing incriminating statements even after *Miranda* advisal is given and the desire to remain silent has been expressed. *Id.* at 474.

This prophylactic rule is designed to safeguard an essential freedom. Thus, once the accused indicates that he or she wishes to remain silent, all interrogation must cease. All further police-initiated questioning is proscribed even if the suspect "has been advised of his rights." *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

Miranda and *Edwards* require that incriminating information provided by a suspect subjected to custodial interrogation after invocation of the right to remain be excluded from trial. There are no ifs, ands, or buts about it: the "merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Minnick v. Mississippi*, 498 U.S. 146, 151, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990).

Miranda, Edwards, and their progeny establish indisputably that police officers are not permitted to question suspects in custody after the accused invokes the right to remain silent or requests an attorney. This entitlement has been described in a variety of ways. For

example, in *Lego v. Twomey*, 404 U.S. 477, 488, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), this Court explained that *Miranda* "excludes confessions flowing from custodial interrogations unless adequate warnings were administered and a waiver was obtained."

Similarly, in *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), this Court stated:

> In the years since the decision in *Miranda*, we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses cannot be introduced into evidence to establish his guilt. *Id.* at 429.

As the *Berkemer* opinion elucidates, the purpose of *Miranda* is to guarantee that the police do not coerce captive suspects into making incriminating statements, and "as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary." *Id.* at 433.

Thus, the breadth of *Miranda*:

> The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary

> within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda's* preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm. *Oregon v. Elstad*, 470 U.S. 298, 307, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

The presumption of compulsion created by this Court's *Elstad* decision compels the conclusion that this state court conviction was unconstitutionally obtained: that damaging incriminating statements and the fruits thereof were admitted into evidence despite having been obtained in violation of *Miranda* and in the face of an unequivocal invocation of the right to remain silent by the accused.

In this case, the Colorado courts also thumbed their judicial noses at *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). In that case, Richard Mosley told the police after questioning began that he did not want to answer questions. Although questioning temporarily terminated, a short time later subsequent questioning took place. In deciding the *Mosley* case, this Court discussed *Miranda*, and concluded as follows:

> In sum, the Court held in that case that unless law enforcement officers give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be

> admitted in evidence against him as a defendant in trial, *even though the statement may in fact be wholly voluntary.* *Id.* at 99-100 (emphasis supplied).

This was the essence of the error committed by the state courts here: a later finding of "voluntariness" is not and has never been a substitute for *Miranda* advisal and the duty to "scrupulously honor" a suspect's invocation of the right to remain silent.

There can be little doubt that the question asked was custodial interrogation. Custodial questioning includes those methodologies "that the police should know is reasonably likely to evoke an incriminating response from a suspect...." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). There was no claim by the inquiring officer that his question was prompted by a concern for public safety or by exigent circumstances.

On the contrary, the incident with Okihiro had occurred days before, and the investigation had only taken place because of the report filed by petitioner who was concerned about the whereabouts of his girlfriend. Indeed, at the time of inquiry, the police had no information from the complaining witness to the effect that shots had been fired during the incident, although Okhiro's story in that regard changed dramatically at trial. *Cf. New York v. Quarles*, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984)("public safety" exception to the *Miranda* exclusionary rule).

This is not a case where the suspect personally initiated further discussions with law enforcement authorities. *See, e.g., Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). Nor does it involve a situation where the evidence was offered in

rebuttal, to impeach the accused after testimony. *See Michigan v. Harvey,* 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990).

In this case the evidence obtained was introduced in the prosecution's case in chief, to help convict the defendant, who did not testify at trial. The admissions in this case flowed directly from "coercive activity" by the State. *See Colorado v. Connelly*, 479 U.S. 157, 165, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). The claim that petitioner subsequently "consented" to the search of his home runs afoul of well-established case law to the contrary. *See, e.g., Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

The "harmless error" analysis by the majority of the Colorado Court of Appeals was also fatally flawed, premised as it was on the theory that the admission of testimony concerning the statements and subsequent evidentiary observations and seizures had no impact on the jury, as two of the three appellate judges concluded. This felony menacing conviction was premised entirely on the credibility of the complaining witness. Her believability was substantially bolstered by the incriminating and inconsistent remarks attributed to Perry Maruca and the officers' own observations about the existence of firearms in the home.

It is simply impossible to fairly conclude that testimony about petitioner's acknowledgement that: his guns were properly turned over to the police for "safekeeping;" that he had been contemplating suicide, and his inconsistent comments about why his girlfriend had moved out; had no effect on the verdict, let alone that such evidence was harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The statements attributed

to Perry Maruca included his concession that there was a reason to turn his guns over to the police for "safekeeping" and that he had been contemplating suicide. These reputed remarks directly corroborated the claim by his girlfriend that, while holding a firearm, he claimed that he was going to "take her with him."

Such evidence was hardly harmless; on the contrary, this evidence was devastating, perhaps "the most probative and damaging evidence" introduced into evidence in this cases in a manner inconsistent with "the thesis that ours is not an inquisitorial system of criminal justice." *Arizona v. Fulminante*, 490 U.S. 279, 292-294, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). As this Court acknowledged in *Fulminante*:

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative or damaging evidence that can be admitted against him... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." *Id.* at 296, *quoting Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

Thus, as this Court even more recently opined:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely

unattributable to the error. *Sullivan v. Lousiana,* 508 U.S. ___ 113 S.Ct. ___, 124 L.Ed.2d 182, 189 (1993).

As the dissenting state appellate judge noted, the testimony concerning the incriminating statements attributed to petitioner and the evidentiary observations by the officers corroborated the account of the incident provided by the complaining witness, testimony unsubstantiated by physical evidence or any other evidence. No fair reading of the record could possibly give rise to a supportable conclusion that the challenged evidence was harmless beyond a reasonable doubt, that the guilty verdict in petitioner's trial was "surely unattributable" to the improperly obtained evidence, as is required under *Sullivan.* As a consequence, petitioner prays for an order granting certiorari, to reverse the judgment of the Colorado Court of Appeals affirming petitioner's conviction of felony menacing.

Respectfully submitted,

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APPENDIX A
COLORADO COURT OF APPEALS
No. 93CA1033

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,
v.
PERRY MARUCA,
Defendant-Appellant.

Appeal from the District Court of Boulder County
Honorable Joseph Bellipanni, Judge
No. 92CR1078

(Filed October 6, 1994)
DIVISION IV JUDGEMENT AFFIRMED
Opinion by JUDGE HUME
Davidson, J., concur
Pierce, J., * dissents

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*Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, Sec. 5(3), and §24-51-1105, C.R.S. (1993 Cum. Supp.).

Defendant, Perry Maruca, appeals from a judgment of conviction entered upon a jury verdict finding him guilty of felony menacing. We affirm.

I.

The principal issue raised by defendant concerns the trial court's refusal to suppress testimony concerning weapons found at the defendant's apartment and statements that defendant made concerning his suicidal thoughts. The trial court ruled that this evidence was obtained from defendant's volunteered statements. We perceive no reversible error.

Defendant was asked by police to come to the police station, where he was arrested for felony menacing. After his arrest he became agitated and quite vocal, and there is evidence to support the trial court's finding that he was not given *Miranda* warnings at that time. After the arresting officers had calmed him, one of them asked defendant where his guns were. Defendant initially refused to answer that question, but after further reflection and without further interrogation, he volunteered to surrender his guns to the police for safekeeping.

The officers then accompanied defendant to his residence where he turned the guns over to them and made a statement regarding his previous thoughts of suicide. Still later, defendant made a third statement to the effect that he knew the victim was leaving him because she had "taken a lot of clothes with her."

At trial, the guns were not placed into evidence. One of the officers testified about the suicide statement and both officers testified that guns matching the description given by the victim were recovered from defendant's apartment and that they were in working order.

Here, the evidence is sufficient to support the trial court's finding that defendant's statements to police were voluntary and not the product of coercion by virtue of the custodial setting in which they were made. The statements made by defendant during and after the visit to his home were volunteered rather than being made in response to any police interrogation. They were made long after the sole inquiry made by the officers at the police station. Similarly, defendant's physical surrender of the guns at his home was a volitional act performed after he had initially exercised his right to remain silent and without further request or inquiry by the officers.

Even if we assume that the initial statement indicating defendant's willingness to surrender the guns was elicited in violation of the *Miranda* rule, the U.S. Supreme Court has held that, under some circumstances, the improper admission of such evidence may be considered harmless if other evidence of the accused's guilt is overwhelming. *See Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991); *Milton v. Wainwright*, 407 U.S. 371, 92 S.ct. 2174, 33 L.Ed.2d 1 (1972).

Here, the defense presented no evidence. The bulk of the People's evidence consisted of the extensive testimony by the victim who described in detail how defendant had threatened her with the guns and indicated that he intended to commit suicide and "take her with him." In view of this testimony, the brief corroborative testimony of the police officers relating to the weapons and to defendant's statements was harmless.

Our review of the record leaves us with no reasonable doubt that the jury in this case would have reached the same verdict without hearing the testimony of either officer and that there was overwhelming evidence of guilt, fairly established by

the state through the use of evidence which is not being challenged. *See Milton v. Wainwright, supra. See also Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *People v. Wilson*, 709 P.2d 29 (Colo. App. 1985).

Therefore, we conclude that any error in the trial court's refusal to suppress the statements made by defendant and the ensuing testimony regarding the weapons that flowed from those statements was harmless beyond a reasonable doubt.

II.

Defendant also contends that he was denied a fair trial when, during closing argument, the prosecutor implied that more serious charges could have been filed and indicated his own personal knowledge of the alleged embarrassment of the victim. We disagree.

In closing argument, counsel is entitled to argue all reasonable inferences from the facts and evidence, *People v. Constant*, 645 P.2d 843 (Colo. 1982), *cert. denied*, 459 U.S. 832, 103 S.Ct. 73, 74 L.Ed.2d 72 (1982). Counsel may, with propriety, comment on how well and in what manner a witness measures up to the tests of credibility set forth in the instructions. *People v. Lucero*, 677 P.2d 370 (Colo. App. 1983), *cert. dismissed* 706 P.2d 1283 (Colo. 1985). We perceive no reversible error in the statements complained of here.

Judgement affirmed.
JUDGE DAVIDSON concurs.
JUDGE PIERCE dissents.

JUDGE PIERCE dissenting.

I respectfully dissent.

I cannot agree that the testimony of the police officers in this action was harmless beyond a reasonable doubt.

The case had to stand or fall on the credibility of the complaining witness. A great deal of her testimony concerned the actions and statements of the defendant regarding his threats of suicide. The testimony also concerned descriptions of the weapons and their location in the apartment.

The cross-examination also pointed out some discrepancies. The most serious of which was that in her testimony the complaining witness made references to a shot probably being fired. She admitted that she had not informed the police of this fact prior to her testimony. The testimony of the police officers, the only other witnesses, gave strong support both to the location of the weapons, their appearance, and that they were capable of being fired. Their testimony also gave credance to the victim's several statements regarding the intent to commit suicide by the defendant. I would rule that the prosecution has not carried its burden of proving that this evidence was harmless beyond a reasonable doubt.

When a harmless error ruling is not available, the usual rules regarding the type of interrogation involved here apply.

In *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), The United States Supreme Court promulgated safeguards to protect the constitutional rights of persons subjected to custodial police interrogation. After prescribing

certain warnings which the police must give before questioning begins, the court stated that if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, then interrogation must cease. That principle was violated here.

In *People v. Thomas,* 839 P.2d 1174, 1179 (fn. 4) (Colo. 1992), the Colorado Supreme Court stated; "If statements are made while in custody, such statements will be supressed if *Miranda* warnings have not been given, whether or not they are voluntarily made." *See also Oregon v. Elstad,* 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) (statements taken in violation of *Miranda,* though voluntary, must be excluded from evidence in the prosecution's case).

Here, it is clear that the defendant was under arrest and in custody and had not been given *Miranda* warnings. He refused to talk to police, but they continued their interrogation and asked him where the guns were. All of his statements thereafter and the recovery of the weapons were the fruit of the "poisonous tree" and should have been supressed. *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *People v. Breidenbach,* 875 P.2d 879 (Colo. 1994).

Accordingly, I would reverse the judgment and remand the cause to the trail court for a new trial.

APPENDIX B

THE COURT OF APPEALS OF THE STATE OF COLORADO

Case Number 93CA1033

ORDER

PEOPLE V PERRY MARUCA

Upon consideration of the Petition for Rehearing filed by the Appellant herein, the Petition is hereby DENIED. Pierce, J. would GRANT. It is ordered that issuance of the Mandate is stayed to and including December 05, 1994 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:
Hume, J.
Davidson, J.
Pierce, J.

DATED: November 03, 1994

(SEAL)

APPENDIX C

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SC696
CERTIORARI TO THE COLORADO COURT OF APPEALS, 93CA1033
DISTRICT COURT, BOULDER COUNTY, 87CR625

ORDER OF COURT

PERRY MARUCA,

Petioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 5, 1995

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Colorado Court of Appeals

(SEAL)